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DANAHARTA URUS SDN BHD

v.

KP MANUFACTURING SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF J
[CIVIL SUIT NO: D4-22-1830-2005]
17 JANUARY 2008

C ***CIVIL PROCEDURE:*** *Judgment - Default judgment - Setting aside - Solicitor's inadvertent failure to enter date of hearing in diary - Whether solicitor's explanation acceptable - Action barred by limitation - Whether Limitation Act 1953 overrides Pengurusan Danaharta Berhad Act 1998 - Whether defence on merits*

D ***CIVIL PROCEDURE:*** *Action - Limitation period - Action commenced by statutory body governed by Pengurusan Danaharta Nasional Berhad Act 1998 - Whether Limitation Act 1953 applicable*

LIMITATION: *Statutory body - Applicability of Limitation Act 1953* E *- Statutory body created and governed by Pengurusan Danaharta Nasional Berhad Act 1998 - Whether 1998 Act overrides Limitation Act 1953 - High Court ruling in Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor excluding Limitation Act - Whether overruled by Court of Appeal*

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This was an appeal from the decision of the Senior Assistant Registrar by the 2nd and 4th defendants ('the defendants') against the dismissal of their application to set aside the judgment in default entered against them. The judgment was entered due to G the failure of their former solicitor to appear on the date of hearing. The said solicitor apologised and explained by affidavit that the reason for his absence was because of his inadvertent failure to enter the hearing date in the diary. The defendants also cited the defence on merits, *ie*, that the action was barred by the H Limitation Act 1953. The main issue was whether the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Danaharta Act') could override the provisions of the Limitation Act 1953.

Held (allowing the appeal):

I **(1)** The language in both ss. 14(4)(k) and 57(1) of the Danaharta Act do not make any reference to the issue on limitation. There is no conflict with the provisions of the Danaharta Act

with that of the Limitation Act 1953. In fact, none of the provision in the Danaharta Act denies the defence of limitation as a bar to an action nor does the Danaharta Act overrule the limitation period to an action or the Limitation Act 1953 itself. It followed that s. 14(4)(k) of the Danaharta Act does not override the limitation period and is wholly irrelevant to the issue of limitation as a bar to an action. (paras 8 & 9)

(2) The Court of Appeal had overruled the High Court decision in *Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor* ('*Kekatong*') on the exclusion of limitation by the Danaharta Act. The Court of Appeal found that the limitation issue was factually disputed in relation to the date of accrual of the cause of action. With that finding, the Court of Appeal recognised the applicability of limitation to the case despite being governed by the Danaharta Act. Further, in another High Court case, *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* the learned judge also considered limitation as a defence available. (paras 10, 11 & 12)

(3) Whether the further payment by the defendants through a foreclosure proceeding amounted to a fresh payment as envisaged by s. 26(2) of the Limitation Act 1953 thereby revising the date of the cause of action was an issue for trial and should not be pursued at this stage. (para 13)

(4) Though the Danaharta Act governed the present action, it did not exclude the defence of limitation. It followed that the defence of limitation was available to the defendants. Whether or not the defendants succeed on this defence was not an issue before this court. The defendants ought to be given a chance to advance their defences at the trial. (para 14)

(5) The court accepted the explanation by the former solicitor for the defendants of his inadvertence in not entering the hearing date into his diary. (para 15)

Case(s) referred to:

Alias Ismail v. Hairuddin Mohamad & Anor [1997] 4 CLJ 669 CA ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 7 CLJ 353 HC ***(refd)***

Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors [1983] 2 MLJ 227 ***(refd)***

Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd [2003] 3 CLJ 378 CA ***(refd)***

A *Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Berhad & Anor [2002] 7 CLJ 175 HC* ***(refd)***
Pai Khek Meng v. Harbi Alan [2006] 7 CLJ 609 HC ***(refd)***
Tio Chee Hing & Ors v. Government of Sabah [1981] 1 MLJ 207 ***(refd)***

Legislation referred to:
B Limitation Act 1953, ss. 6(a), 26(2)
Pengurusan Danaharta Act 1998, ss. 14(2), (3), (4)(k), 57(1)

For the plaintiff - Ahmad Petra Firdaus Abdullah; M/s WY Chan & Roy
For the 2nd & 4th defendants - Chan Siew Cheong; M/s Teh & Lee

C *Reported by Usha Thiagarajah*

JUDGMENT

D **Rohana Yusuf J:**

[1] This is an appeal notice in encl. 19 by the second and fourth defendants against the decision of the learned Senior Assistant Registrar who had dismissed the application by both
E defendants to set aside the judgment in default entered against them.

Background

[2] The judgment in default was entered against both defendants
F who were guarantors to the first defendant in a banking facility agreement granted by Bank Bumiputra Malaysia Berhad (BBMB). The judgment was entered due to the failure of their former solicitor to appear on the date of hearing. The solicitor had apologised and explained by an affidavit in encl. 15 that the
G reason for his absence was because of his inadvertent failure to enter the date in the diary. The defendants cited defence with merits in that, the action against them has been barred under The Limitation Act 1953.

H **[3]** The plaintiff in objecting to the application by the defendants contends that limitation cannot apply for two reasons. First, as the debt owed to the BBMB has been vested to the plaintiff, Danaharta Urus Sdn Berhad, the statute of limitation cannot apply and secondly, that the date of the accrual of the cause of
I action should run from the date of foreclosure of the charged property involved.

Defence With Merits

[4] It is the defence case that the notice of demand issued to both defendants dated 22 December 1994 by BBMB shows that default took place prior to that date. Following that notice of demand which gave the defendants 14 days to settle outstanding due, the cause of action against the defendants accrued on 5 January 1995.In view of that date, the limitation to bar any action against the defendants pursuant to the guarantee would have set in on 5 January 2001, by virtue of s. 6(a) of the Limitation Act 1953 (the Limitation Act). Learned counsel for the defendents, Mr. Chan Siew Cheong cited the cases of *Haji Hussin bin Haji Ali & Ors. v Datuk Haji Mohamed bin Yaacob & Ors* [1983] 2 MLJ 227, *Tio Chee Hing & Ors v. Government of Sabah* [1981] 1 MLJ 207, *Alias bin Ismail v. Hairuddin bin Mohamed & Anor* [1997] 4 CLJ 669 and *Pai Khek Meng v. Harbi bin Alan* [2006] 7 CLJ 609 as authorities in support of his contention. Learned counsel argued that the defendants should be given a chance to argue their defences in a proper trial and it mattered not if the defendants would have any chance of succeeding or otherwise.

[5] Mr. Chan further submitted that even though the plaintiff was vested with the rights, titles and interests of BBMB only on 7 July 1999 limitation had set in on 5 January 2001 and the plaintiff only commenced action on 20 December 2005 which is way after the limitation period.

[6] Learned counsel for the plaintiff Mr Ahmad Petra Firdaus citing the judgment in *Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Berhad & Anor* [2002] 7 CLJ 175, submitted that the Pengurusan Danaharta Act 1988 has an overruling effect on the Limitation Act. Azmel J (as he then was) held in that case that the wordings of s. 14(4)(k) read with and s. 57(1) of the Pengurusan Danaharta Act 1998 (the Danaharta Act) override the provisions of the Limitation Act. The High Court came to that conclusion on the basis that there is a conflict between s. 14(4)(k) of the Danaharta Act with that of the Limitation Act. The learned judge finds that the Danaharta Act being a specific and a later legislation overrides the provision of the Limitation Act being a general and later law. In response, Mr. Chan for the defendants submitted that based on clear wordings in the cited provisions of the Danaharta Act above there is no room to uphold such interpretation because there is nothing in these provisions that expressly or impliedly override or extend limitation period.

A **Whether The Pengurusan Danaharta Act 1988 Excludes Limitation**

[7] The main issue for my determination is whether the provisions of the Danaharta Act overrides the limitation statute
B and thereby precludes defence of limitation to the defendants. Section 14 of the Danaharta Act deals with the subject of vesting of assets. This provision provides for the powers, effects, rights and other implications of vested assets under the Danaharta Act. Section 14(2) clearly provides that the effect of vesting in
C accordance with the provisions of the Danaharta Act will be binding on any person affected even if it goes against the Civil Law Act 1956 or any other laws. Under s. 14(3), from the vesting date Danaharta acquires all rights, titles or interest both present and future in relation to the assets vested. Then s. 14(4) provides
D for a whole list of other implications on the assets vested. For ease of reference I now reproduce s. 14(4)(k) of the Danaharta Act below:

> 14(4) Without prejudice to sub-section (1), (2) or (3) in relation to an asset vested in the Corporation:
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> (k) no provision in any law or agreement limiting or prohibiting the right of the seller or requiring any consent to assign, dispose or transfer such asset shall have any application or effect in respect of any acquisition or disposition by the
F Corporation, except that a disposition of such asset by the Corporation shall be subject to the approval of the relevant regulatory body or relevant State Authority having jurisdiction over such disposition.

[8] Whilst s. 57(1) of Danaharta Act empowers Danaharta as
G acquiree of the assets to dispose the assets by way of private treaty. Having carefully read these two provisions I agree with the submission of learned counsel for the defendants that these two provisions have no reference to the issue on limitation. Section 14(4)(k) above in fact precludes the application of law or
H agreement which limit or prohibit the right of seller or which requires any consent to dispose those assets by Danaharta, except that approvals from the relevant regulatory authorities or State Authority must still be obtained if so required. I find the language in both ss. 57(1) and s. 14(4)(k) of the Danaharta Act make no
I specific or general reference to the issue on limitation. The issue

of limitation has not at all been addressed in these provisions, as s. 14(4)(k) only deals with the preclusion of consent requirement either under any agreement or any law that limit Danaharta to dispose assets vested in it save and except the requirements of consent from relevant regulatory authorities or the State Authority. As such there is no basis to say that there is a conflict between this provision with that of the Limitation Act to enable an interpretation of giving any overruling effect by the Danaharta Act being a specific law over the Limitation Act being a general law, or the later law over the earlier law. A provision in a statute cannot be read to repeat another provision in another statute in absence of clear and specific language to state so.

[9] Thus even though all rights, titles and interest vest in the plaintiff, under the Danaharta Act it cannot change in status unless specifically excluded or provided in the Act itself. None of the provision in the Danaharta Act has denied a defence of limitation, as a bar to an action nor does the Act overrule the period of limitation to an action or the Limitation Act. I find that s. 14(4)(k) of Danaharta Act does not override the limitation period nor expand it and in fact is wholly irrelevant to the issue of limitation as a bar to an action.

[10] That apart, I also find that the decision of the Appeal Court has in fact by implication overruled that decision. Mr. Ahmed Petra for the plaintiff contends that eventhough *Kekatong* case was brought up to appeal the issue of limitation as held by the High Court was not reviewed by the Appeal Court and remains a good law. I do not agree with that submission. I however agree with the submission of learned counsel for the defendants that the ruling of the High Court on this issue has been overruled by the Appeal Court. In the Appeal Court case as reported in *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378, Gopal Sri Ram JCA makes the following observation at p. 386:

> The issues raised before the learned judge included the question as to whether the plaintiff was an "obligor" within the Act. **The other issue related to the question whether the plaintiffs claim was barred by limitation**. The first is a question of law, while the second involves questions of fact. Taking the second point, we need only say that Mr Thomas in his closing arguments conceded that there were several hotly contested issues of fact on the limitation point, in particular, as to when the cause of action arose. (emphasis added)

[11] It is clear from the above observation that the Court of Appeal was still considering the applicability of limitation to the case. The Court of Appeal finds the issues of limitation was factually disputed in relation to the date of the accrual of the cause of action which accordingly was a hotly contested issue in that case. With that finding the Court of Appeal does recognise the applicability of limitation to the case despite being governed by the Danaharta Act. Hence, the fact that the Appeal Court has given consideration on the issue of limitation at the appeal stage, in my view, the decision of the High Court in *Kekatong* on the exclusion of the limitation by the Danaharta Act has impliedly been overruled by the Court of Appeal.

[12] Once again in another High Court case *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 7 CLJ 353 the issue of limitation was also given consideration in relation to assets vested under the Danaharta Act. In that case James Foong J (as he then was) deliberated on the application for removal of caveats. The dispute on limitation was raised in that case in relation to the computation of accrual of limitation of 12 years and the defendant's attempt to bar the plaintiff from asserting its rights to the land. James Foong J then remarked that limitation is merely a defence available to the defendant but cannot be a cause of action. I agree with the counsel for the defence that it is clear from this decision in that case, that limitation is not excluded in the application of the Danaharta Act. I agree with James Fong J in giving consideration to limitation as being relevant because the Danaharta Act does not overide limitation as a bar to an action.

Accrual Of Cause Of Action

[13] Counsel for the plaintiff further submits that in the event limitation applies, the date of accrual of action does not favour the second and the fourth defendants as there was evidence of further payment by the defendants through a foreclosure proceeding. According to the counsel for the plaintiff fresh accrual of action took place when the account of the first defendant was paid in part after the foreclosure proceeding on 31 May 2000. Under s. 26(2) of the Limitation Act fresh step revises the date of the cause of action against the defendants by virtue of that part payment. To this, the counsel for the defendants disputed. The counsel for the defendants raised the issue of whether that part payment would amount to payment made by the defendants

remains questionable. Further question was raised if Danaharta's sale of the foreclosed property to its subsidiary and deposited to the defendant's account would amount to a fresh payment as envisaged by s. 26(2) of the Limitation Act. I find that the merits of this defence of limitation is an issue for trial and need not be pursued at this stage.

[14] In conclusion I find that though this action against the defendants is made by a body created and governed by the Danaharta Act, it does not exclude a defence of limitation. I find that the defence of limitation is available to the defendants here and whether or not the defendants succeed on this defence is not an issue before me at this stage. The defendants ought to be given a chance to advance their defences.

[15] I also accept the explanation by the previous counsel for the defendants of his inadvertence in not entering the date into his diary as explained in his affidavit in encl. 15.

[16] For all these reasons I hereby allow the defendants' appeal notice in encl. 19 with costs.